

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

ROBERTS OXYGEN COMPANY

Employer¹

and

Case 5-RC-15652

TEAMSTERS LOCAL UNION NO. 639,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, AFL-CIO

Petitioner¹

DECISION AND DIRECTION OF ELECTION

The issues in this proceeding are: (1) whether the petitioned-for unit limited to supply, CO², and cylinder delivery drivers is an appropriate unit; (2) whether assistant production manager/operator Mike Porter is a supervisor within the meaning of Section 2(11) of the Act; and (3) whether the Employer's dispatchers are supervisors within the meaning of Section 2(11) of the Act.

The Petitioner seeks to represent all full-time and regular part-time supply, CO², and cylinder delivery drivers located at the Employer's "Railroad Street" facility in Gaithersburg, Maryland.² The Petitioner argues that the approximately 26 employees in the petitioned-for unit shares a close and substantial community of interest that is separate and distinct from that of the other Railroad Street employees, and would thus be an appropriate bargaining unit.

The Employer maintains that the petitioned-for unit does not constitute a functionally distinct group with special interests sufficient to warrant their separate representation. The Employer asserts that the only appropriate unit is one that consists of the approximately 50 employees who comprise the "operations group." In addition to the petitioned-for employees, the operations group includes approximately 16 fill room operators (sometimes referred to as

¹ The names of the parties appear as amended at the hearing.

² At the hearing, the Petitioner stated it was willing to proceed to an election in any unit found appropriate by the Regional Director or the Board. There is no relevant history of collective bargaining for any of the employer's employees at the location involved herein. For ease of reference, the unit described above will be referred to as the petitioned-for unit.

operators), and maintenance employees, three driver/installers (sometimes referred to as service technicians), two warehouse employees, and two or three dispatchers.³

I have carefully considered the evidence and arguments presented by the parties on these issues. As discussed below, I conclude that the petitioned-for unit is inappropriate for purposes of collective bargaining. I also conclude that the Petitioner failed to sustain its burden of establishing that the dispatchers and assistant production manager/operator Mike Porter are supervisors within the meaning of Section 2(11) of the Act.

The Employer presented one witness at the hearing: David Mason, vice president of operations. The Petitioner presented two witnesses: CO² delivery driver Robert Hendry and cylinder delivery driver Richard Payette.

BACKGROUND/OVERVIEW

The Employer, a Maryland Corporation, is engaged in the non-retail distribution of industrial, specialty, and medical gases.⁴ Solely involved in this proceeding is the Employer's Railroad Street facility in Gaithersburg, Maryland.

The Employer is a wholesale regional distributor of compressed gasses and welding supplies. It has 38 locations in the Mid-Atlantic region out of which it produces and distributes products to customers in Maryland, Pennsylvania, Virginia, and Washington, DC. The Railroad Street facility is the central distribution and production operation through which approximately 75 to 80 percent of the compressed gases and welding supplies are either distributed to the Employer's regional branches or delivered directly to its customers. The industries served by the Employer include construction, research and development, service and hospitality industries, and the medical community.

OVERALL OPERATIONS OF THE RAILROAD STREET FACILITY

David Mason is the Employer's vice president of operations. He is responsible for all facets of the Employer's company-wide operations and distribution. He spends approximately 60 percent of his time, or at least three days per week, at the Railroad Street facility. Reporting directly to Mason is the facility's operations production manager, Ron Kirby. Kirby directs the day-to-day operations of the facility. With respect to the employees of the facility, Kirby has the authority to hire, evaluate, promote, award pay increases and bonuses, and discipline. Reporting directly to Kirby are the employees who comprise the Employer's operations group, as described above. In addition to Kirby, there are four other supervisors who assist in managing the Railroad Street facility.⁵

³ The parties stipulated that the Employer's five inside sales employees and the Customer Call Center employees are properly excluded from the bargaining unit.

⁴ The parties stipulated that the Employer is engaged in commerce within the meaning of the Act.

⁵ The parties stipulated that the following individuals, in addition to Mason and Kirby, are supervisors within the meaning of Section 2(11) of the Act: Operations Support Manager Gary Cardarelli; Customer Stations Manager Ben Dodgen; Customer Service Manager Reggie Wright; and Sales/Compliance Manager Lawrence Priebe.

The Railroad Street's main building, a production facility, includes a production area where gas cylinders are filled, a maintenance area where the cylinders are repaired and maintained, a cylinder storage area, a hard goods and equipment storage area, and a loading dock. On the outside perimeter of the facility are bulk storage tanks, an employee parking lot, and a truck parking area. The Employer has approximately 30 delivery and supply trucks, seven tractor-trailer trucks, and 12 trailers based at this facility. Adjacent to the production facility is a two-story office building that houses the customer call center and the dispatch operations.

The Employer employs approximately 26 drivers. It is the responsibility of the drivers to deliver compressed gas and supplies to either directly to customer locations or to the Employer's regional branches. The gases are delivered either in cylinders, which are left with the customers and later picked up when empty, or in bulk, meaning transferred through a hose from a bulk tank on the back of the Employer's truck into the customer's tank at its location. When the drivers pick up empty cylinders and return them to the facility, they are unloaded and taken them to the fill room operators or, if they are in obvious need of repair, to the maintenance area. All drivers are required to have a commercial driver's license (CDL) with one of two classes, either a Class A, which is a tractor trailer license, or a Class B, which is a straight truck license up to a specified weight, both with HAZMAT and Tanker endorsements.

There are approximately 16 fill room operators and maintenance employees. These employees operate the equipment used to build, fill, and maintain the cylinders that contain the compressed gases. In addition, the fill room operators also load and unload trucks and make deliveries to both customers and the Employer's regional branches.

The Employers' two warehouse employees are responsible for receiving cylinders and hard goods items that the Employer sells and distributes, and storing them in the correct bin locations. When customers purchase these items, the warehouse employees identify and pull the items for subsequent delivery.

There are approximately three driver/installers who are responsible for delivering and installing gas distribution systems directly to customers. They also perform maintenance of these systems at the customers' location. In addition, driver/installers deliver cylinders and other products directly to customers as needed. Driver/installers are required to have the same driving credentials as drivers--a Class A or Class B CDL.

The Employer has three dispatcher positions.⁶ The dispatchers are responsible each morning for organizing the deliveries to be made that day and presenting it to Kirby for his approval. Once approved, the dispatchers gather the documents needed by the drivers to make the deliveries, including delivery tickets and equipment lists that contain the customer's name, account number, invoice number, and products to be delivered. Throughout the day, the

⁶ The Employer currently has only two employees working as dispatchers--Darren Gordon and Joseph Bertone. Del Gendron is also a dispatcher but is currently in training to become a backup driver. According to Mason, he will return to his position as a dispatcher in "two or three months."

dispatchers are in continuous contact with the drivers to provide information needed to make deliveries or to assist with problems that arise in the course of the day.⁷

Supervisory Status of the Dispatchers and Assistant Production Manager/Operator Mike Porter

The Petitioner contended at the hearing, but did not argue in its brief, that the Employer's dispatchers and assistant production manager/operator Mike Porter are supervisors within the meaning of Section 2(11) of the Act. The Employer asserts that the evidence fails to establish that either the dispatchers or Porter possess any of the primary indicia of supervisory status.

Dispatchers

There is no contention or evidence that the dispatchers have the authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward, discipline, or adjust grievances of employees or effectively to recommend such action. The Petitioner's claim of supervisory status rests with its assertion that the dispatchers assign and responsibly direct the work of the drivers.

As described above, dispatchers are responsible for organizing the deliveries each morning and gathering the documents needed by the drivers to make the deliveries. In determining the various loads and routes of the drivers, dispatchers employ a software program that configures the routes based on zip codes that are input by the dispatchers. Once this configuration is complete, the dispatchers review it, adding or eliminating routes as necessary. It is then presented to production manager Kirby who has the final authority on its approval. Once approved, the dispatchers generate delivery tickets and equipment lists that contain the customer's name, account number, invoice number and products to be delivered. These lists are then placed in a bin specific to the route that was assigned. When drivers arrive in the morning, they pick up the delivery tickets from their pre-assigned route and proceed with their deliveries. Dispatchers do not assign the specific routes to the drivers; these decisions are made exclusively by Kirby.

According to supply driver Rick Payette, if he encounters any problems with his delivery tickets in the morning, he will discuss the matter with the dispatchers. For example, if he feels a delivery has been wrongly coded and should be on another driver's route, he will bring it to the attention of the dispatcher. The dispatcher will then check into the problem by means of his computer software and/or by consulting with another driver. If warranted, the dispatcher will reassign the ticket. Payette did not testify as to whether the dispatcher consulted with anyone prior to making this decision. Finally, Payette testified that when Del Gendron left his inside sales position and became a dispatcher, Mason introduced Gendron to the employees as "our new dispatch supervisor," telling the employees that they should report any problems or concerns to him. The record contains no further evidence concerning what, if any, supervisory authority Gendron possessed.

⁷ For example, a driver may call the dispatcher if he cannot locate a customer address or arrives at a customer location and discovers its office is closed.

Throughout the day, dispatchers are in continuous contact with the drivers to provide information needed to make deliveries or to assist with problems that may arise. Payette testified that approximately 8 to 9 years ago, he assisted the dispatchers while on light duty due to an injury. According to Payette, the inside sales personnel would give customer orders for same-day deliveries to the dispatchers several times per day. In those circumstances, the drivers will make such a delivery in addition to his regularly scheduled deliveries for that day. Payette testified that when this occurred, the dispatchers would assign the deliveries to the drivers without first consulting with or getting permission from Kirby.

CO² delivery driver Bob Hendry also testified that the dispatchers notify the drivers when customers call and place orders for same-day delivery of products. Hendry testified that he assumed information on these same-day deliveries came from the inside sales personnel, but did not know, however, whether the dispatchers were merely passing on instruction received from someone else. In addition, Hendry testified that “on occasion,” a dispatcher has called to tell him to report to work later than his normal reporting time the following day due to a high demand for same-day deliveries. Hendry gave no testimony concerning his knowledge of who actually made the decision concerning such a change to his work schedule.

Mike Porter

Porter is an assistant production manager and fill room analyst/operator. Like all other operations group employees, he reports directly to Kirby. According to Mason, Porter performs all duties of a fill room operator and devotes approximately 80 percent of his time to this function. During the time he spends as fill room operator, he primarily operates the analytical equipment in performing quality control checks of the products. Before a filled tank can be released, Porter’s signature signifying that the quality is acceptable is required. Other operators, such as Miguel Ferpozzi, Kurt Christopher, and Luiz Navarro, also perform this quality control function.

As assistant production manager, Porter coordinates the delivery of product into the bulk storage tanks at the facility. According to Mason, he also coordinates the activities of other operators when there is a question of where the Employer’s “best efforts” should be applied; any changes in work flow, however, must be approved by Kirby. In addition, Porter participates in the interviewing process. He is responsible for scheduling additional interviews of promising applicants and provides input to Kirby regarding applicants when requested. There is no evidence, however, that Porter has the authority to hire applicants or to effectively recommend such action. With respect to the evaluation of operators, Mason testified that Porter provides input to Kirby concerning the performance of the operators. Kirby also receives similar input from dispatchers and drivers. Porter has no authority to discipline employees.

Porter is the only operator with a company-issued “Nextel,” which is a combination phone/two-way radio that he uses to communicate with Kirby when Kirby is away from the facility. All other operators carry “location-specific” radios.⁸ Porter is a salaried employee, unlike the other operators who are paid by the hour. His salary is on the “high end” of the

⁸ Nextels are also issued to dispatchers and drivers.

operators' hourly wages; Mason testified that there are only two operators who earn as much as Porter.

Hendry testified that Porter "runs the plant" when Kirby is away. When asked to provide his basis for this understanding, Hendry stated that he "sees people report to him." In addition, Hendry testified that if he, for example, is asked to make cylinder deliveries and cannot find the cylinders, he goes to Porter and reports the problem. If Porter does not know where the cylinders are, he contacts the fill room operator and asks them where the cylinders are located. Based on this, it is Hendry's "impression" that Porter is the fill room operators' supervisor.

Payette also testified concerning Porter's supervisory status. He stated that he has occasional interaction with Porter in the mornings and in the evenings when unloading his truck. As an example of this interaction, Payette testified whenever he has a problem involving the fill plant personnel, such as a damaged cylinder, he reports the problem to Porter who "dishes out the work to whoever does it." Payette also testified that he has observed Porter telling employees to "stop what they're doing and go do something else." He has also seen Porter telling employees to "pull trucks out of this hold and that hold, so he assigns the work, as far as I know." Payette further testified that Porter "might pull somebody who is filling nitrogen, off of nitrogen, and have them fill argon, if we needed argon bottles." Finally, Payette testified that Porter is "in charge" when Kirby is not at the facility.

Analysis

Section 2(11) of the Act, 29 U.S.C. Section 152, provides:

The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is to be read in the disjunctive; the possession of any one of the authorities listed is sufficient to place an individual invested with this authority in the supervisory class. *Mississippi Power Co.*, 328 NLRB 965, 969 (1999), citing *Ohio Power v. NLRB*, 176 F.2d 385, 387 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949). Applying Section 2(11) to the duties and responsibilities of any given person requires the Board to determine whether the person in question possesses any of the authorities listed in Section 2(11), uses independent judgment in conjunction with those authorities, and does so in the interest of management and not in a routine manner. *Hydro Conduit Corp.*, 254 NLRB 433, 437 (1981). Thus, the exercise of a Section 2(11) authority in a merely routine, clerical, or perfunctory manner does not confer supervisory status. *Chicago Metallic Corp.*, 273 NLRB 1677 (1985). As pointed-out in *Westinghouse Electric Corp. v. NLRB*, 424 F.2d 1151, 1158 (7th Cir. 1970), cited in *Hydro Conduit Corp.*: "the Board has a duty to employees to be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights which the Act is intended to protect." See also *Quadrex Environmental Co.*, 308 NLRB 101, 102 (1992). In this regard,

employees who are mere conduits for relaying information between management and other employees are not statutory supervisors. *Bowne of Houston*, 280 NLRB 1222, 1224 (1986).

The party seeking to exclude an individual from voting for a collective-bargaining representative has the burden of establishing that the individual is ineligible to vote. *Kentucky River Community Care, Inc.*, 523 U.S. 706 (2001). Conclusory evidence, "without specific explanation that the [disputed person or classification] in fact exercised independent judgment," does not establish supervisory authority. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991). Similarly, it is an individual's duties and responsibilities that determine his or her status as a supervisor under the Act, not his or her job title. *New Fern Restorium Co.*, 175 NLRB 871 (1969).

I find the Petitioner has not met its burden of establishing that the dispatchers are supervisors within the meaning of Section 2(11) of the Act. The evidence does not support a finding that the dispatchers possess or exercise any of the primary indicia of supervisor authority set forth in Section 2(11). At most, the Petitioner has shown the dispatchers' limited role in ensuring that same-day deliveries are assigned to drivers is governed by a computerized routing system and an established protocol set by the Employer. There was no evidence that the dispatchers exercised any independent judgment in evaluating the relative skill or experience of the drivers in this process. On the contrary, the record establishes that Kirby, an admitted statutory supervisor, has full responsibility for assigning all routes and deliveries to the drivers on a daily basis. This finding is supported by Board law, which has typically found that dispatchers in a variety of industries are not supervisors. See, e.g., *B.P. Oil*, 256 NLRB 1107 (1981) (dispatchers of mechanics and drivers of heating oil trucks); *Interstate Motor Freight System*, 227 NLRB 1167 (1977) (dispatchers of truck drivers), and *New England Transportation Co.*, 90 NLRB 539 (1950) (dispatchers of bus drivers). The courts have agreed. In *Meenan Oil Co. v. NLRB*, 139 F.3d 311 2d. Cir. 1998), the court stated that dispatchers of fuel oil truck drivers and service employees "are routine and clerical in nature, and they are governed by parameters set by the Company." Accord, *NLRB v. Sherwood Trucking Co.*, 775 F.2d 744, 749 (6th. Cir. 1985) (routine dispatch of employees "within parameters carefully drawn" is not statutory supervision). Furthermore, Gendron's job title of "dispatch supervisor" is not controlling on the issue of his statutory supervisory status. *New Fern Restorium Co.*, *supra*.

I similarly find that Petitioner has not met its burden of establishing that Porter is a supervisor within the meaning of Section 2(11) of the Act. Mason's testimony established that 80 percent of Porter's time is devoted to performing the same functions other fill room operators who have not alleged to be supervisors. The evidence concerning his remaining job functions does not establish that he exercises any degree of independent judgment related to the primary indicia of supervisory status. There is some evidence to suggest that Porter assigns work, but the testimony elicited from each of the three witnesses concerning this indicia of supervisor status was far too conclusory to sustain the Petitioner's burden. Mason only testified that Porter "coordinates" the delivery of product and the activities of other operators. In their jobs as drivers, Hendry and Payette spend the bulk of their work hours away from the facility making deliveries and, admittedly, have limited contact with Porter. Nevertheless, their testimony establishes, at best, that Porter provides some direction and assignment to fill room operators, but I find this direction and assignment to be routine and typical of that normally exercised by a lead

person. *Dynamic Science, Inc.*, 334 NLRB 391 (2001); *Chevron Shipping Co.*, 317 NLRB 379 (1995).

The remaining evidence of Porter's supervisory status, including the fact that he is a salaried employee, is the only operator to carry a Nextel, and has some involvement in the interview process, is no more than secondary indicia. When, as here, there is no evidence presented that an individual possesses any one of the several primary indicia of statutory supervisory status enumerated in Section 2(11) of the Act, secondary indicia are insufficient by themselves to establish supervisory status. *Ken-Crest Services*, 335 NLRB 777, 779 (2001).

In sum, I find the degree of judgment exercised by Porter falls below the threshold required to establish statutory authority.

Analysis: Community of Interest Issue

Section 9(b) of the Act states the Board "shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof...." The statute does not require that a unit for bargaining be the only appropriate unit, or the ultimate unit, or the most appropriate unit. Rather, the Act only requires that the unit be "appropriate." *Overnite Transportation Co.*, 322 NLRB 723 (1996); *Parsons Investment Co.*, 152 NLRB 192 fn. 1 (1965); *Morand Bros. Beverage Co.*, 91 NLRB 409 (1950), enf'd. 190 F.2d 576 (7th Cir. 1951). A union is, therefore, not required to seek representation in the most comprehensive grouping of employees unless "an appropriate unit compatible with that requested does not exist." *P. Ballantine & Sons*, 141 NLRB 1103 (1963); *Bamberger's Paramus*, 151 NLRB 748, 751 (1965); *Purity Food Stores, Inc.*, 160 NLRB 651 (1966). It is well settled that there is more than one way in which employees of a given employer may appropriately be grouped for purposes of collective bargaining. *General Instrument Corp. v. NLRB*, 319 F.2d 420, 422-3 (4th Cir. 1962), cert. denied 375 U.S. 966 (1964); *Mountain Telephone Co. v. NLRB*, 310 F. 2d 478, 480 (10th Cir. 1962).

Community of duties and interests of the employees involved is the major determinant. *Swift Co.*, 129 NLRB 1391 (1960). If there is a sufficient community of interest among employees, the fact that groups of employees have different duties and responsibilities does not make a combination of those employees inappropriate. *Berea Publishing Co.*, 140 NLRB 516, 518 (1963). Relevant considerations include: (a) similarity in the scale and manner of determining earnings; (b) common supervision (c) similarity of employee functions/type of work performed; (d) qualifications, skills and training of employees; (e) interchange and contact among employees; (f) integration of production processes; and (g) employment benefits, hours of work, and other terms and conditions of employment. *Kalamazoo Paper Box Corp.*, 136 NLRB 134 (1962).

Applying the factors above to the facts developed on the record in this case, I find the petitioned-for unit does not constitute a functionally distinct group with special interests sufficient to warrant their separate representation.

A. Wages

The record establishes that the employees in the operations group, regardless of job classification, earn between \$14 and \$20 per hour. With the exception of the dispatchers and assistant production manager/operator Mike Porter, all employees in this group are hourly employees. Drivers and driver/installers earn between \$15 and \$20 per hour. Hourly wages for fill room operators and maintenance employees range from \$14 to \$19.75. Warehouse employees are paid \$15 to \$19 per hour. The dispatchers are salaried employees, earning the equivalent of \$17 to \$18 per hour. Finally, assistant production manager/operator Mike Porter's salary is equivalent to approximately \$19.75 per hour. Only hourly employees are eligible for overtime pay.

B. Common Supervision

The employees in each of the job classifications comprising the operations group are all supervised by a single individual--production manager Ron Kirby. Kirby has the authority to hire and promote employees in the operations group and prepares their quarterly evaluations. He also has the authority to increase salaries and set bonus amounts for the operations group and approves all vacation schedules. Finally, Kirby is responsible for directing all accident investigations involving the operations group employees and has the authority to determine the level of appropriate discipline.

C. Similarity of Employee Function/Type of Work Performed

The record establishes a close similarity between the work of the drivers and driver/installers. As set forth more fully below, drivers and driver/installers are similar in that each are required to load trucks every morning and deliver products directly to customers. Both are required to have CDLs. Each group performs some functions of the other as needed by the Employer. They work similar hours, earn the same pay, and their deliveries are all recorded in the same accounting database.

There is less similarity between the drivers and the remaining job classifications. Although drivers do perform some of the functions of the employees who work inside the facility such as filling of CO² tanks, retrieving cylinders from the storage area, and assisting with final packaging of cylinders, these functions are not within their primary job descriptions. Nevertheless, the record clearly establishes that drivers spend about 2½ hours per day performing loading and unloading duties in the warehouse in close proximity to all other employees except the dispatchers.

D. Qualifications, Skills and Training

All drivers and driver/installers must possess a CDL, either Class A or Class B. Aside from licensing, there are no other qualifications required to obtain a driving position with the Employer, although Mason conceded that driving experience is helpful. The remaining job classifications require no prior training or experience; these employees are essentially unskilled labor at the time of hiring.

The Employer provides on-the-job training to newly hired employees. With respect to operators, this training lasts one to two weeks and is required by the Food & Drug Administration due to the types of gases they handle. Consequently, there are some aspects of the operator job that untrained employees are prohibited from performing. There was no testimony or evidence concerning the training for the remaining job classifications.

The record establishes that with the exception of the requirement that drivers and driver/installers have a CDL, employees are not required to have any special skills, training, certifications, licenses, or experience to obtain a position with the Employer.

E. Interchange and Contact Among Employees

The Petitioner contends that employees in the petitioned-for unit have almost no contact or interchange with other employees of the Employer. The record evidence does not support this contention, however, as the testimony established regular overlap and frequent interchange of the duties of the drivers and driver/installers.

Driver/installers are primarily responsible for the delivery, installation, and service of gas distribution systems. They also, however, perform deliveries normally made by the delivery drivers. Each morning before they leave the facility for an installation job, they are required to make sure that they are not needed for delivery of cylinders or other products to customers that are normally delivered by the delivery drivers. On those occasions when driver/installers make such deliveries, they deliver the same products to the same customers as the delivery drivers. Driver/installers are also pressed into service as delivery drivers on days when there is a heavy workload or a driver calls in sick. In his testimony, delivery driver Rick Payette estimated when fully staffed, driver/installers act as drivers once per week. In the six to eight weeks prior to hearing, however, Payette characterized the participation of driver/installers in delivery driver functions as “substantial” due to understaffing.

Drivers also intermittently perform some duties of the driver/installers. Delivery driver Bob Hendry testified that while he is not qualified to do complete installations of gas delivery systems, he is able to respond to some service calls of these customers if they involve minor repairs to the systems. Similarly, while drivers are not qualified to perform all duties of the operators, they can perform some filling operations involving the transfer of CO².⁹ According to Hendry and Payette, drivers also perform plant operation duties such as loading and unloading cylinders into trucks, retrieving cylinders from the storage area, and operating an electric pallet jack. In addition, Mason testified that drivers assist the operators by placing the final packaging on cylinders after they have been filled and taking them out of the quarantine area of the facility.

The record also disclosed that employees in the “non-driving” job classifications frequently assume driving responsibilities. The testimony established, for example, that operator Bob Winkler is scheduled to regularly transfer products to New Jersey one day per week. Likewise, maintenance employee Bill Hines is scheduled to transfer products from the Railroad

⁹ Mason identified five drivers that operate the CO² filling equipment--Roberto Rubi, Jeff Tucker, Kenny Dick, Ed Preston, and Bob Hendry.

Street facility to the Employer's facility in Rockville, Maryland, one day per week. Operator Miguel Ferpozzi is also used to make deliveries to other regional branches or directly to customers. All three of these individuals are required to hold a CDL to operate the delivery trucks, the same requirement as the delivery drivers and driver/installers. In addition, all of the deliveries made by Winkler, Hines, and Ferpozzi are tracked and maintained by the Employer in the same database as those of the drivers and driver/installers.

This interchange of employees is further underscored by the fact that employees frequently and easily transfer permanently from one job classification to another. Dispatcher Del Gendron is presently training to become a driver, and has a CDL permit; he was formerly an inside salesman. Operator Winkler was a delivery driver until approximately 1997. Former employee Joe Hallemeyer transferred from a delivery driver position to an operator position in January of 2003. In 2001, Derwin Adamson transferred from a maintenance position to a warehouse position. Both Randy Sink and Dan Bagley transferred from drivers to driver/installers in 1988 and 1996, respectively. Finally, Dave Lundy has been a driver, driver/installer, and dispatcher.

Temporary transfers between job classifications in some circumstances are also permitted by the Employer. For example, Payette testified that he temporarily worked in the dispatch office assisting with the dispatcher duties while he was on light duty do to a surgery. Such temporary transfers do not appear to occur frequently, however. On the other hand, driver/installers do frequently substitute for drivers who are absent due to sickness or other reasons.

Employees working inside the warehouse--operators, maintenance employees, and warehouse employees--work side-by-side and, consequently, have frequent interaction with one another. Although drivers and driver/installers spend a majority of their day on deliveries, Payette estimated that he spends about 2½ hours per day, or approximately 25 percent of his work week, working at the facility.¹⁰ During this time period, Payette and the other drivers and driver/installers are in constant contact with the dispatchers and the warehouse employees in the course of either preparing for, or returning from, their deliveries for the day. The drivers and driver/installers are also in frequent contact with the dispatchers throughout the day exchanging information concerning their deliveries.

This substantial contact, interaction, and permanent transfers between members of the petitioned-for unit and excluded classifications significantly weaken the Petitioner's arguments regarding this factor.

F. Integration of Production Processes

The Employer's production process from the initial customer order until the final delivery of the purchased product impacts each of the job classifications of the operations group. Customer order processing is generally initiated by the customer's call to the Employer's Customer Call Center. The customer service employee enters the customer's order information,

¹⁰ Payette testified that this estimate of time spent at the facility was also a "fair estimate" for the other drivers.

including gas or equipment to be delivered, shipping location, and shipping date, into the accounting system. This information is then sorted by request date, generating information to be used by the operations group to complete the customer order.

Based on this information, the operators and maintenance employees determine what kinds of gas cylinders are required to complete the order. These employees fill the cylinder, test the product, and either place the cylinders in the storage area for loading by the delivery drivers or load the trucks themselves, depending on the work load.

Warehouse employees are responsible for assisting in the preparation of customer orders for hard goods such as welding supplies. In those cases, the warehouse employees pull the items from the storage area and will similarly place the cylinders in the storage area for loading by the delivery drivers or load the trucks themselves.

The accounting system also generates the driver manifests utilized by the drivers and driver/installers that contain information required to complete the delivery. The dispatchers provide the drivers with the manifests and other customer information as they arrive in the morning. The drivers then load their trucks, if not already loaded by the operators, maintenance, or warehouse employees, and spend the majority of their day making deliveries, installing or servicing gas distribution systems, and retrieving empty cylinders from their customers.

G. Employment Benefits, Hours of Work and Other Terms and Conditions of Employment

All full-time employees, including supervisors and managers, are offered the same benefits package. This includes the same healthcare plan, profit sharing, quarterly bonuses, education reimbursement, vacation, jury duty, and funeral leave. All employees are also subject to the same workplace rules.

Employees in the operations group all wear the same uniform. They also occasionally attend the same meetings and training classes together.

The facility's hours of operation are 3:30 a.m. to 7:00 p.m., resulting in staggered shifts of the employees in the operations group. Delivery drivers and driver/installers begin their shifts between 5:00 a.m. and 7:30 a.m.; their shifts end, depending on the workload, between 3:00 p.m. and 7:00 p.m. The fill room operators' shifts begin between 4:00 a.m. and 6:30 a.m. and end between 2:30 p.m. and 5:30 p.m. Warehouse employees shifts begin between 5:00 a.m. and 7:00 a.m. and end, depending on the workload, between 3:30 p.m. and 5:30 p.m. There are currently two dispatchers who work overlapping shifts. One works 4:00 a.m. to 2:00 p.m., and the other works 8:30 a.m. to 6:00 p.m.

Based on the foregoing, I find that the petitioned-for unit does not constitute a functionally distinct group with special interests sufficient to warrant their separate representation, based on the factors articulated in Kalamazoo Paper Box Corp., 136 NLRB 134 (1962).

The record discloses that the employees in the operations group have similar wage rates, benefits, uniforms, and are supervised in common by a single individual. The record further establishes that there is substantial interchange and similarity between the job functions of the drivers and the driver/installers. Both follow the same daily routine of arriving for work each morning, obtaining information on the day's deliveries from the dispatchers, loading their trucks, and delivering products directly to customers. When drivers call out sick or there is otherwise a need for a driver, driver/installers easily and frequently transition into their positions. When this occurs, the duties of the driver/installers are identical to those of the drivers they are replacing.

The evidence also establishes that other operations group employees have significant and regular driving responsibilities. As is the case with driver/installers, when operators and/or warehouse employees transfer and deliver materials, their duties in this capacity are indistinguishable from those of the drivers. Moreover, these employees must maintain the same driving credentials as the drivers in the petitioned-for unit.

The job functions of the drivers also overlap with the functions of other employees in the operations group. Both drivers and plant personnel load and unload trucks, perform filling operations of CO² gas, retrieve cylinders from the storage area, and package cylinders. Moreover, both drivers and driver/installers spend as much as 25 percent of their time working at the facility as opposed to making deliveries.

The frequency by which employees have permanently transferred between the various operations group job classifications further supports the conclusion that the petitioned-for unit is not a sufficiently distinct group warranting separate representation. Numerous employees have transferred to or from the driver positions, as well as among and between the other job classifications.

In asserting a unit of drivers is appropriate, the Petitioner relies, in part, on the Board's decision in *Overnight Transportation Co.*, 331 NLRB 662 (2000), in which it excluded drivers from a unit of warehouse employees. This case is distinguishable from the facts in the instant case. In *Overnight*, the Board found that the drivers worked away from the facility and did not have overlapping duties or interchange with the employees in the unit found appropriate. Furthermore, the drivers were paid a mileage rate, the only classification paid in that manner. In the instant case, the record establishes common wages, supervision, benefits, and uniforms. More importantly, there is significant interchange of and interaction between the drivers and the other operations group job classifications.

Based on these factors, I find the drivers and the operations group employees share a close community of interests and are so functionally integrated as to preclude the separate representation of the drivers in a unit apart from the operations group. *Standard Oil Company*, 147 NLRB 1226 (1964). Accordingly, I find the appropriate unit to be:

All full time and regular part-time delivery drivers, driver/installers, maintenance employees, warehouse employees, fill room operators, and dispatchers employed by the Employer at its Gaithersburg, Maryland facility, excluding inside sales

personnel, customer service employees, guards and supervisors as defined by the Act.

At hearing, the Petitioner stated its willingness to proceed to an election in any unit found appropriate. Since the unit I find appropriate is broader than the petitioned-for unit, the Petitioner is granted fourteen (14) days from the date of this Decision to make an adequate showing of interest, if necessary. Should the Union not wish to proceed to an election in the broader unit, it will be permitted, upon request, to withdraw its petition without prejudice.

CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is an employer as defined in Section 2(2) of the Act and is engaged in commerce within the meaning of Sections 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. Petitioner, Teamsters Local No. 639, International Brotherhood of Teamsters, AFL-CIO, a labor organization as defined in Section 2(5) of the Act, claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The parties stipulated that Roberts Oxygen Company, Inc., is a Maryland Corporation with an office and place of business in Gaithersburg, Maryland. It is engaged in the wholesale distribution compressed gasses and welding supplies. During the preceding 12 months, a representative period, the Employer has purchased and received at its Gaithersburg, Maryland, facility, products, goods and materials valued in excess of \$50,000 directly from points located outside the State of Maryland.
6. I find, the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full time and regular part-time delivery drivers, driver/installers, maintenance employees, warehouse employees, fill room operators, and dispatchers employed by the Employer at its Gaithersburg, Maryland facility, excluding inside sales personnel, customer service employees, guards and supervisors as defined by the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by **TEAMSTERS LOCAL UNION NO. 639, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO**. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their status as such during the eligibility period, and the replacements of those economic strikers. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, National Labor Relations Board, Region 5, 103 South Gay Street, Baltimore, MD 21202, on or before **December 18, 2003**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever

proper objections are filed. The list may be submitted by facsimile transmission at (410) 962-2198. Since the list will be made available to all parties to the election, please furnish a total of two copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EDT on **December 29, 2003**. The request may not be filed by facsimile.



/s/Wayne R. Gold

Wayne R. Gold, Regional Director
National Labor Relations Board
Region 5

Dated: December 11, 2003

440-1760-6201
440-1760-6280
177-8520-0800
177-8520-2400